UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005	))))	Docket No. RM05-32-000

REPLY COMMENTS OF CONGRESSMAN JOE BARTON

Pursuant to the Commission's Notice of Proposed Rulemaking ("NOPR") in the above-captioned proceeding, I hereby submit my Reply Comments. I am a member of the United States House of Representatives, representing the 6th District of the State of Texas. In my capacity as Chairman of the House Committee on Energy and Commerce (Committee), I was a principal drafter of the Energy Policy Act of 2005 (EPACT 2005). EPACT 2005 provides for the repeal of the Public Utility Holding Company Act of 1935 (PUHCA or "1935 Act") in Title XII (Subtitle F—Repeal of PUHCA), sections 1261-1277 (hereinafter "PUHCA Repeal Subtitle"). I have a strong interest in ensuring that the provisions are implemented according to their text and intent and am, therefore, pleased to have the opportunity to submit these Reply Comments. These Reply Comments represent my personal views and are not intended to represent the views of other members of Congress or the Committee.

I. EPACT 2005 Repealed PUHCA to Eliminate Regulatory Burdens, Not to Create New Regulatory Burdens.

Section 1263 of EPACT 2005 states: "The Public Utility Holding Company Act of 1935 (15 U.S.C. 79 et seq.) is repealed." This concise provision is the most important provision in the PUHCA Repeal Subtitle. There is no ambiguity in the text or intent of this

provision. The entire text of PUHCA and all regulations issued thereunder have been eliminated (effective February 8, 2006).[1]

For more than 20 years, the Securities Exchange Commission (SEC) consistently supported repeal of PUHCA. On numerous occasions, SEC officials have testified before the Committee, and other committees of the House and Senate, in favor of PUHCA repeal. As recently as February 13, 2002, SEC Commissioner Isaac Hunt stated:

> In the early 1980s . . . the SEC concluded that many aspects of 1935 Act regulation had become redundant. Specifically, state regulation had expanded and strengthened since 1935, and the SEC had enhanced its regulation of all issuers of securities, including public utility holding companies. The SEC therefore concluded that the 1935 Act had accomplished its basic purpose and that many of its remaining provisions were either duplicative or were no longer necessary to prevent the recurrence of abuses that had led to the Act's enactment. The Commission thus unanimously recommended that Congress repeal the Act.[2]

In calling for repeal, the SEC has also noted concerns about potential cross-subsidization. The SEC concluded that federal and State authority to review books and records would provide sufficient protection: "The best means of guarding against cross-subsidization is likely to be audits of books and records and federal oversight of affiliate transactions. Any move to repeal PUHCA should include provisions giving the Commission and state regulators the necessary tools to engage in this type of oversight."[3]

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[1] Section 1262(6) of the PUHCA Repeal Subtitle incorporates by reference the 1935 Act definitions of "exempt wholesale generator" and "foreign utility company" "as those sections existed on the day before the effective date of this subtitle" (emphasis added). These definitions in PUHCA as such are nevertheless also repealed. Therefore it is correct to say that the entire text of PUHCA is repealed effective February 8, 2006.

[2] Testimony of Isaac Hunt before the House Committee on Energy and Commerce, Feb. 13, 2002.

[3] Id.

The SEC did not call for replacement of PUHCA with a massive new regulatory regime, duplicative filing requirements, new structural barriers, or other unnecessary restrictions.

The PUHCA Repeal Subtitle reflects the SEC's recommendations regarding repeal and books-and-records authority. The text and legislative history of the PUHCA Repeal Subtitle make clear that it is a de-regulatory, not re-regulatory, statute. The purpose of PUHCA repeal is to help attract needed investment in the nation's electric utility infrastructure by eliminating arcane, duplicative, and burdensome regulations that have hindered that investment. Congress did not intend, and the text of the statute does not require or invite, the Federal Energy Regulatory Commission (Commission) to "re-create" a new regulatory regime to take the place of PUHCA or otherwise to devise a new set of duplicative and burdensome regulations that will have the same chilling effect on investment as PUHCA has had for decades. In view of these basic principles, I am perplexed and disappointed by the recommendations of a few commenters that the Commission should, in effect, turn back the clock to 1935 by replacing PUHCA with a legion of new filing requirements, prescriptive and preemptive federal standards, and structural barriers that would duplicate or replace many of the most obsolete and harmful features of PUHCA.

I also take particular exception to the view that the PUHCA Repeal Subtitle is merely a "Congressional punch list" with "tight deadlines" that make it "difficult" for the Commission to engage in a "comprehensive review" needed for "rethinking and recreating regulatory infrastructure in fundamental ways."[4] The fact that there are "tight deadlines" for implementing the PUHCA Repeal Subtitle is consistent with the intent of the statute

[4] Comments of APPA-NRECA at 3.

that there is no need, or authority, for the Commission to engage in a wholesale re-regulation in the wake of PUHCA repeal. Now is not the time to revive PUHCA by "recreating" obsolete "regulatory infrastructure."

II. Access to Books and Records Does Not Require Perpetuation of Defunct SEC Regulations.

The NOPR proposes the retention of certain PUHCA reporting requirements, including Form U5S and Form U-13-60, as well as other reporting requirements. I believe that the final rule must eliminate these reporting requirements. The PUHCA Repeal Subtitle, as stated above, entirely repeals the 1935 Act. No provision, nor any regulation thereunder, is preserved. In particular, Sections 1264 and 1265 make no reference to the 1935 Act or any regulations previously issued thereunder. There is no reason to suppose that Congress intended the Commission to preserve specific PUHCA reporting requirements promulgated under a statute that has been repealed. Sections 1264 and 1265 simply direct holding companies and their affiliates to maintain and make available to the Commission and the States certain books and records that relate to "jurisdictional rates." This language does not literally "transfer" any SEC authority, under PUHCA or otherwise, to the Commission. Rather, it specifically refers to matters that are otherwise "jurisdictional" to the Commission. Accordingly, I agree with commenters who suggest that the Commission should continue to use existing forms only, such as FERC Form 1, and should not adopt another agency's regulations that no longer have any legal force or effect.

III. Exemptions Should Be Broadly Construed.

I agree with commenters who observe that the Commission's authority to exempt classes of persons and transactions from books-and-records review should be liberally construed to fulfill the de-regulatory purpose of the statute. As the Commission notes in the NOPR, public utilities are subject to the Commission's books-and-records authority

under section 301 of the Federal Power Act. Thus, there is no need to impose new requirements under section 1264 on any entity that was exempt under PUHCA, including:

- every entity that is now exempt under PUHCA section 3(a)(1)-(5), such as intrastate holding companies;
- EWGs and FUCOs;
- exempt telecommunications companies (ETCs) under PUHCA section 34(a)(1); and passive investors, such as mutual funds.

Existing exemptions for exempt wholesale generators (EWGs) and foreign utility companies (FUCOs) should be preserved. Oddly, a few commenters seem to believe that EWGs and FUCOs as classes of entities will somehow be eliminated by PUHCA repeal and that therefore such exemptions are only temporary or transitional. This understanding is false. Nothing in EPACT 2005 eliminates these classifications or the associated exemptions. On the contrary, section 1266 expressly requires FERC to exempt EWGs and FUCOs in exactly the same way as they were exempt from the 1935 Act. These continued exemptions are consistent with the principle that PUHCA repeal is a means of eliminating burdensome regulations, not a vehicle for imposing new regulations on entities that were not previously subject to such burdens.

With regard to EWGs and FUCOs specifically, section 1266 commands the Commission to exempt from the federal books-and-records requirements "any person that is a holding company, solely with respect to one or more . . . exempt wholesale generators; or ... foreign utility companies." There is no ambiguity in these words. To say that section 1266 requires an exemption for such entities is not a matter of interpretation, but rather a matter of reading.

Moreover, there is no implication whatsoever in section 1266 that these exemptions are somehow temporary or transitional. The terms "exempt wholesale generator" and

"foreign utility company" have exactly the same meaning as they did in the definitions provided in the 1935 Act. The PUHCA Repeal Subtitle incorporates these PUHCA definitions by reference. Section 1262(6) provides that the terms EWG and FUCO "have the same meaning as in sections 32 and 33, respectively, of [PUHCA], as those sections existed on the day before the effective date of this subtitle." Section 32 of PUHCA defines EWG as "any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates ... and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale...." FUCO is defined in section 33 as

> any company that—
>
> (A) owns or operates facilities that are not located in any State and that are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, if such company—
>
> (i) derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, within the United States; and
>
> (ii) neither the company nor any of its subsidiary companies is a public utility company operating in the United States; and
>
> (B) provides notice to the Commission, in such form as the Commission may prescribe, that such company is a foreign utility company.

The fact that PUHCA is entirely repealed has no bearing on whether the words of these definitions still carry the same meaning. The words of PUHCA sections 32 and 33, as incorporated by reference into EPACT 2005, have exactly the same meaning under EPACT 2005 as they would have if they had been restated verbatim in section 1266. As

noted above, section 1262(6) provides that the terms EWG and FUCO have "the same meaning" as they did "on the day before the effective date of this subtitle" (emphasis added). It is a simple rule of statutory drafting that incorporating a definition by reference is the same as restating the definition verbatim.[5] Here again, this is a matter of reading, not interpretation. These words will mean what they say on February 7, 2006; and again on February 8, 2006, February 9, 2006 and so forth until Congress chooses to repeal them. The Commission has no authority to "discontinue" these exemptions after a "transitional period."

The question has also been raised regarding whether the Commission should continue to make case-by-case determinations regarding EWG and FUCO eligibility after the PUHCA Repeal Subtitle takes effect. Here again, the statute is clear that the relevant definitions will continue to mean what they have always meant prior to the effective date. The definition of EWG in PUHCA section 32(a)(1), the text of which is now incorporated by reference into EPACT 2005 section 1262(6), states that the term EWG "means any person determined by [FERC]" to meet the specified requirements qualifies as an EWG. This definition does not say "any person previously determined" nor "once upon a time, any person determined" nor the like. Because the same words are incorporated by reference into section 1262(6), they will have the same meaning on February 8 as they always did under PUHCA—i.e., they mean that when FERC determines that a person fits within the substantive terms of the definition of EWG, such person is exempt from the requirements of section 1264 of EPACT 2005, just as they were exempt from PUHCA.

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[5] See, e.g., D. Hirsch, DRAFTING FEDERAL LAW (1989) at §5.17 (stating that a definition using incorporation by reference is "substantively identical" to a verbatim definition).

The PUHCA definition of EWG further provides that "No person shall be deemed an [EWG] under this section unless such person has applied to the [FERC] for a determination under this paragraph" and provides that persons applying in good faith are deemed exempt until FERC makes such determination. This language obviously contemplates an ongoing application and determination process. All of this language is included in the EWG definition of PUHCA section 32, which is incorporated by reference into the PUHCA Repeal Subtitle. Therefore, the application and determination process continues to apply in the future, just as it applied under PUHCA.

In the case of FUCOs, it could hardly be more apparent that the exemption will continue to apply to any company that meets the substantive definition of FUCO. The definition of FUCO is specifically incorporated by reference into EPACT 2005, which means that the words used in PUHCA section 33 have exactly the same meaning as they would have if they were re-typed and inserted into the EPACT 2005. The words of the FUCO definition, restated above, boil down to a simple formula: "any company that [meets the substantive requirements of the definition and] provides notice to the Commission ... that such company is a foreign utility company." These words are all part of EPACT 2005 by incorporation. On February 8 and every day thereafter, they will mean the same thing they meant on February 7. Accordingly, in the future, if a company falls within the definition and notifies the Commission that it is a FUCO, it will be exempt from the books-and-records requirements of section 1264. The Commission has no statutory authority to "repeal" this definition and therefore is required to recognize existing and future FUCO classifications.

I also agree with commenters who state that passive investor groups, such as mutual funds, should be exempt from books-and-records requirements. These exemptions are

consistent with the principle that PUHCA repeal is intended to eliminate, not create, regulatory burdens.

IV. EPACT 2005 Does Not Require or Authorize the Commission to Re-regulate Cost Allocation for Non-Power Goods and Services.

Section 1275 of EPACT 2005 gives the Commission limited authority, under specific circumstances, to "review and authorize" cost allocations for non-power goods and services. This authority applies only "at the election of the system or a State commission having jurisdiction over the public utility." (§ 1275(b)). The NOPR seeks comment on whether holding companies that prior to the repeal of PUHCA were registered holding companies should be required to file cost allocation agreements with the Commission, pursuant to its authority under Section 205 of the Federal Power Act. Contrary to the views of a few commenters, I believe that such a requirement would undermine the de-regulatory purpose of PUHCA repeal and should therefore not be adopted. The Commission's authority with respect to cost allocation is limited to section 1275 and any existing authority the Commission may have under section 205 of the Federal Power Act. The Commission should not expand its regulation of cost allocation on a generic basis under section 205, but rather should limit its review to the circumstances specified in section 1275—i.e., to when the system or a State commission specifically requests the review.

The NOPR specifically asks whether, in view of PUHCA repeal, holding companies that prior to the repeal of PUHCA were registered holding companies should be required to file such cost allocations with the Commission under section 205 of the FPA and section 4 of the NGA. (NOPR at P13). Such companies should not be required to file these agreements as a matter of course. Section 1275 clearly limits review of cost allocations to

when a system or State requests such review. Also, EPACT 2005 section 1267 makes clear that the Commission retains whatever authority it may otherwise have under the Federal Power Act with respect to just and reasonable rates and cost recovery. Registered holding company status has no bearing on the Commission's exercise of its enumerated authorities under EPACT 2005 or the Federal Power Act.

V. EPACT 2005 Provides No Authority to Impose Structural Barriers.

In his 2002 testimony before the Committee, SEC Commissioner Hunt observed that

> repeal of the [1935] Act would eliminate regulatory restrictions that prohibit utility holding companies from owning utilities in different parts of the country and that prevent nonutility businesses from acquiring regulated utilities. In particular, repeal of the restrictions on geographic scope and other businesses would remove the impediments created by the Act to capital flowing into the industry from sources outside the existing utility industry.[6]

Consistent with Commissioner Hunt's recommendations, Congress repealed PUHCA in part to eliminate structural barriers to investment, including geographic and line-of-business restrictions.

Contrary to congressional intent, some commenters urge the Commission to adopt rules regarding the diversification of utility companies into non-utility businesses. The Commission must act according to the text and intent of the statute. The SEC had authority under Sections 10 and 11 of PUHCA 1935 to regulate such diversification. However, these sections were repealed by the PUHCA Repeal Subtitle and Congress did not provide the Commission with the authority to issue these or similar rules. The Commission should also reject the views of commenters who asked for a variety of new

[6] Testimony of Isaac Hunt before the House Committee on Energy and Commerce.

structural regulations, such as "ringfencing" requirements, stock ownership restrictions, financial and corporate separation requirements, or other structural requirements.

VI. The PUHCA Repeal Subtitle Does Not Provide New Authority to Address Cross Subsidization.

I also disagree with commenters who urge the Commission to adopt further rules to prevent cross-subsidization. The PUHCA Repeal Subtitle, as the Commission recognizes, is primarily a "books and records" statute.[7] It does not provide the Commission with substantive authority outside of the narrow confines of the statutory language. Some commenters apparently view the NOPR as an opportunity to re-legislate by regulation what Congress has decisively eliminated.

I note that the cross-subsidization language in the PUHCA Repeal Subtitle is only a reference to the Commission's *existing* authorities under the Federal Power Act, not a new grant of authority. Specifically, section 1267 of PUHCA 2005 states:

> Nothing in this subsection shall limit the authority of the Commission under the Federal Power Act (16 U.S.C. 791a et seq.) to require that jurisdictional rates are just and reasonable, including the ability to deny or approve the pass-through of costs, the prevention of cross-subsidization, and the issuance of such rules and regulations as are necessary or appropriate for the protection of utility consumers.[8]

The statutory language could not be clearer. The PUHCA Repeal Subtitle states with respect to cross-subsidization that the Commission may exercise its existing authority under the Federal Power Act. The language was not intended to open the door to expand the Federal Power Act in order to reinstate the PUHCA regulatory requirements.

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[7] *See* NOPR at P 25.

[8] PUHCA 2005 at § 1267(a).

The Commission already has ample authority under sections 203, 205 and 206 of that statute to address whether inappropriate cross-subsidization or other forms of affiliate abuse have occurred. The expanded merger review authority under section 203 allows the Commission to prohibit transactions that could result in harmful cross-subsidization. The Commission can also evaluate rate filings under section 205, and hear complaints or initiate investigations on its own under section 206.

Moreover, state regulatory agencies have broad authority under state law to evaluate whether a utility is inappropriately cross-subsidizing affiliates, such as through prudence reviews. The role of state agencies has changed dramatically from the time that PUHCA 1935 was enacted. I am confident that state regulatory agencies are ready, willing and able to ensure that ratepayers in their respective States are not being harmed as a result of affiliate abuse.

CONCLUSION

The purpose of the PUHCA Repeal Subtitle is to reduce regulation and help attract investment in the nation's aging electric infrastructure. Improving infrastructure improves reliability, helps to meet the needs of a growing economy, and benefits consumers by improving efficiencies and eliminating infrastructure "bottlenecks." The Commission has ample authority under the Federal Power Act to protect consumers and investors from potential cross-subsidization or other abuses. PUHCA repeal is a regulatory reform, not a regulatory vacuum. Re-instituting elements of the duplicative, byzantine regulatory regime of the 1935 Act, or replacing them with new layers of regulation, would be unnecessary, contrary to the text and intent of the PUHCA Repeal Subtitle, and would harm consumers by canceling out the many benefits PUHCA repeal will otherwise provide. The

Commission should implement the PUHCA Repeal Subtitle consistent with its purpose of eliminating PUHCA's requirements, not re-imposing or re-creating those requirements.

Respectfully submitted,

Congressman Joe Barton
2109 Rayburn House Office Building
Washington, DC 20515
phone (202) 225-2002
fax (202) 225-3052

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